

ORIGINAL

69154

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON

DEPT. OF TRANSPORTATION
99DEC17 PM 4:39

Joint Application of)
)
)

UNITED AIR LINES, INC.)

and)

AIR NEW ZEALAND LIMITED)
)

under 49 U.S.C. §§ 41308 and 41309)
for approval of and antitrust)
immunity for alliance agreements)

Docket OST-99-

6688-3

**MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. §302.39**

Communications with respect to this document should be sent
to:

SHELLEY A. LONGMUIR
Senior Vice President-
International, Regulatory, and
Governmental Affairs

MICHAEL G. WHITAKER
Vice President-International
and Regulatory Affairs

JONATHAN MOSS
Director-Regulatory Affairs

UNITED AIR LINES, INC.
P.O. Box 66100, WHQIZ
Chicago, Illinois 60666

BRUCE H. RABINOVITZ
JEFFREY A. MANLEY
CATHLEEN P. PETERSON
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5116 (Phone)
(202) 879-5200 (Fax)
bruce.rabinovitz@kirkland.com
(e-mail)

Counsel for
UNITED AIR LINES, INC.

DATED: December 17, 1999

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of)

UNITED AIR LINES, INC.)

and)

AIR NEW ZEALAND LIMITED)

Docket OST-99-

under 49 U.S.C. §§ 41308 and 41309)
for approval of and antitrust)
immunity for alliance agreements)

DATED: December 17, 1999

**MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.39**

United Air Lines, Inc. ("United"), pursuant to Rule 39 of the Department's Rules of Practice (14 C.F.R. § 302.39), requests that the Department withhold from public disclosure the confidential, proprietary and commercially sensitive information United is filing concurrently under seal in the above-captioned proceeding. United is submitting these confidential documents to facilitate the Department's processing of the joint application of United and Air New Zealand Limited for approval of and antitrust immunity for their alliance agreements filed herewith. In support of this request, United submits the following:

I. UNITED'S CONFIDENTIAL DOCUMENTS ARE PROTECTED FROM
PUBLIC DISCLOSURE BY THE FREEDOM OF INFORMATION ACT.

The confidential documents United is filing in conjunction with its joint application with Air New Zealand for antitrust immunity are protected from public disclosure under various exemptions of the Freedom of Information Act ("FOIA"), including 5 U.S.C. 552(b)(3) and 5 U.S.C. 552(b)(4). Exemption (4) protects from public disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." FOIA exempts from disclosure information that is not of the type typically released to the public, where the release would cause substantial harm to the competitive position of the person submitting the information. See, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976); and Joint Application of United and Lufthansa, Order 93-12-32 (December 18, 1993).

Pursuant to 49 U.S.C. § 40115(a)(2)(B), the Secretary of Transportation may order that information filed with the Department be withheld from public disclosure if, inter alia, such disclosure would have an adverse effect on the competitive position of an air carrier in foreign air transportation. FOIA Exemption 3 protects from disclosure information specifically

protected by another federal statute, including 49 U.S.C. § 40115.

The documents for which United requests confidential treatment are: (i) documents responsive to the information requests the Department has issued in recent antitrust immunity proceedings, as detailed in Exhibit JA-9 to the United/Air New Zealand joint application for antitrust immunity; (ii) the United Mileage Plus* and Air New Zealand Air Points** International Carrier Participation Agreements (Exhibit UA-1); and (iii) the United/Air New Zealand International Bilateral Cargo Prorate Agreement (Exhibit UA-2).

The documents United has filed under seal qualify for exemption from public disclosure under these standards. The documents relate to commercially sensitive and proprietary business, financial and corporate matters; they were obtained from a private citizen; and they are not of the type generally released to the public. United would suffer substantial competitive harm if the documents were publicly disclosed. Because the documents are fully encompassed by these standards, and in order to fulfill a central purpose of the FOIA exemption -
- to encourage private citizens to provide the government with

information not typically made public -- protection of United's documents is fully warranted here.¹

II. ACCESS TO UNITED'S CONFIDENTIAL AND PROPRIETARY DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS.

Due to the nature of the documents United has filed, Rule 39 access should be limited to counsel and outside experts that file an affidavit stating that they will (1) use the information only for the purpose of participating in this proceeding; and (2) not disclose the information to anyone other than counsel or outside experts who have filed a valid affidavit with the Department.

The documents United has filed under Rule 39 contain highly sensitive commercial information relating to international strategy, performance and planning. In order to protect United's ability to compete effectively in international markets, it is imperative that this information not be disseminated to United's competitors, even under Rule 39 procedures. In recent years, the Department has routinely limited Rule 39 access to such data filed in the course of antitrust proceedings to counsel and outside experts. See, e.g., Joint Application of Alitalia-Linee

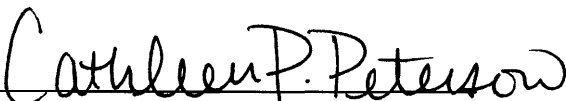
¹ Public disclosure of such information could impair the Government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. See, National Parks & Conservation Ass'n, supra, at 770; Burke Energy Corp. v. DOE, 583 F. Supp. 507, 510 (D. Kansas 1984).

Motion of United Air Lines, Inc.
Page 5

Aeree Italiane-S.p.A., KLM Royal Dutch Airlines and Northwest Airlines, Inc. (Docket OST-1999-5674), Scheduling Notice and *Initial Determination on Motion for Confidential Treatment Under 14 C.F.R. 302.39* (July 19, 1999); and Joint Application of United Air Lines, Inc. and Air Canada (Docket OST-96-1434), *Notice Granting Access to Documents* (July 11, 1997). By limiting access in this manner, the Department can both permit parties to fully participate and deter the competitive harm that would result if the information were disseminated among United's competitors.

WHEREFORE, for the foregoing reasons, the Department should grant United's motion to withhold from public disclosure the confidential, proprietary and commercially sensitive information that United has filed under seal; limit Rule 39 access to counsel and outside experts as described above; and grant such other and further relief as the Department deems necessary.

Respectfully submitted,


BRUCE H. RABINOVITZ
CATHLEEN P. PETERSON
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005

DATED: December 17, 1999